

February 27, 2012

MEMORANDUM

TO: Honorable Linda A. Cohen, Chair
Board of Regents

FROM: Mark B. Rotenberg
General Counsel



RE: Conflict of Interest Opinion

I. Introduction and Summary of Conclusions

This responds to your request, pursuant to the Board of Regents Policy: *Code of Ethics for Members of the Board of Regents* ("Code of Ethics"), Sec. VI, subd. 3 (Attachment A), for a written opinion on two questions concerning Regent Steve Sviggum's recent new employment as Executive Assistant to the Majority Caucus of the Minnesota Senate:

1. Does an employment-related conflict of interest exist with respect to Regent Sviggum's service as a Regent of the University and his employment as Executive Assistant to the Senate Majority Caucus?
2. If so, what is the degree or pervasiveness of that conflict?¹

Pursuant to your direction, this Office retained John Stout, Esq., to consult and provide an independent opinion on these questions. See Attachments B & C. His opinion is provided together with this memorandum, and I incorporate his presentation of the facts as part of this memorandum. See Attachment D.

I also concur in his conclusions, specifically:

¹ The *Code of Ethics*, Sec. VI, subd. 3, states that "a Regent with a conflict of interest question is encouraged to consult with the general counsel." At no time has Regent Sviggum consulted with me on these questions.

1. Regent Sviggum's continued service as a University Regent and employment as Executive Assistant to the Senate Majority Caucus creates a conflict of interest under the University's governing documents.
2. Further, the conflict created by Regent Sviggum's continued service as a University Regent and employment with the Senate Majority Caucus is an employment-related conflict as defined in the *Code of Ethics*, Sec. V, subd. 6, and further creates a fundamental, systemic clash between the duties owed to the University by Regent Sviggum, as a Regent, and the duties owed by Regent Sviggum to the Senate Majority Caucus, as an employee. As long as these two positions are held simultaneously by Regent Sviggum, this systemic conflict cannot be eliminated, managed or cured, including by means commonly used to address transactional, periodic or incidental conflicts.

II. Discussion and Analysis

The Board's *Code of Ethics* is the touchstone for analysis of the questions you have asked. Section V, subd. 6 provides that "an employment-related conflict of interest exists *whenever* a Regent's employment relationships *may impair independence of judgment*." (Emphasis added.) This provision, by its terms, does not list particular employments that constitute a conflict of interest. Instead, it provides a standard by which to determine whether a particular employment situation creates a conflict. In applying the standard, namely, whether a particular employment "may impair independence of judgment," the *Code* requires that it be "interpreted and applied to best serve the interests of the University," not the private interests of a single Regent. Sec. VI, subd. 1. Any doubts are to be resolved against the Regent's involvement. *Id.*

I understand the "independence of judgment" test to be objective, not subjective, in nature. Thus, the issue is whether a reasonable person would objectively view this employment situation as one in which a Regent's independence of judgment may be impaired. The test does not involve an inquiry into Regent Sviggum's individual, subjective intent, or his personal capacity or willingness to avoid actual conflicts in specific situations. *See, e.g., In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011) ("[T]he appropriate standard for determining whether a judge must be disqualified due to an appearance of impartiality is whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality."); *cf.* 42 C.F.R. § 50.604(f) (2011) (Public Health Service conflict-of-interest rules for federally funded research requires a recipient to "reasonably determine[]" whether its researcher's financial interest "could" affect the research). Thus, as noted in Mr. Stout's opinion, the issue here does not require any judgment of Regent Sviggum's own personal integrity, honesty, or willingness to serve the University to the very best of his ability.

A.

There are a number of reasons why a Regent's employment as Executive Assistant to the Senate Majority Caucus objectively should be viewed as one that may impair his independence of judgment as a Regent.

1. As the full-time senior staff person for the Majority Caucus and its Communications Director, Executive Assistant Sviggum will be involved in high-level partisan legislative deliberations and decisions that would cause a reasonable person to question whether that employment "may impair his independence of judgment" as a Regent. *Code of Ethics*, Sec. VI, subd. 3. There are innumerable instances in which the University's financial, operational, facilities, teaching, research, intercollegiate athletics, and other issues are under consideration by the legislature in its committees, floor debates, and negotiations with the Governor and other state officials. In addition, beyond the frequent presentation of those issues in the formal context of the legislature acting as a body, there are ever-present, less formal occasions in which the University's pervasive activities throughout the state are discussed and critiqued among legislators and their staff. There is no practical way for the senior staff person of the Majority Caucus to isolate himself from such matters, or for the Board of Regents to be able to assure itself of such isolation by means of an enforceable management plan, which in other cases might include recusal, disclosure or divestment of a financial interest, etc.
2. As Mr. Stout's opinion describes, Regent Sviggum and Executive Assistant Sviggum have competing duties of loyalty to the Board of Regents and the Senate Majority Caucus, respectively.² Viewed objectively, it seems clear that Regent Sviggum's competing duties of loyalty are very significant, and may impair his independence of judgment in a multitude of specific contexts.
3. Most importantly, and beyond the identifiable specific situations in which competing duties of loyalty may arise, there is a systemic character to the conflict of roles in this case that stems from constitutional principles of separation of powers between the arms of state government. As Mr. Stout's memorandum describes, the founders of our State Constitution mandated that legislators could not simultaneously hold other public offices (with exceptions not relevant here). Similarly, Minnesota judges cannot hold any other state offices or any federal offices (except a military reserve commission). The Minnesota Supreme Court has elaborated upon this fundamental separation of powers principle by declaring that "[p]ublic offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both." *State ex rel. Hilton v. Sword*, 157 Minn. 263, 264, 196 N.W. 467 (Minn. 1923). When an official assumes a second public office that presents a "conflict of duty," the consequence is a "vacation of the first office." *Id.* at 266, 196 N.W. at 468.

² The legal bases of these competing duties of loyalty are found in statutes, common law, Regents Policies, and other legal materials. They are extensively discussed in Mr. Stout's opinion at pp. 4-6.

Regent Sviggum's constitutional duties as Regent and his employment duties to the Senate Majority Caucus present just this sort of "conflict of duty" between incompatible public positions in our state's government. The Minnesota Supreme Court has articulated the constitutional importance of the University's independence from control by the political branches of state government as follows:

The Constitution of the state has declared, in effect, that the management of the University shall be, until the people themselves say otherwise, in a relatively small, slowly changing board, chosen for their special fitness for and interest in the work. . . . [T]he purpose of the Constitution remains clear. It was to put the management of the greatest state educational institution beyond the dangers of vacillating policy, illinformed or careless meddling and partisan ambition that would be possible in the case of management by either Legislative or executive, chosen at frequent intervals and for functions and because of qualities and activities vastly different from those which qualify for the management of an institution of higher education.

State v. Chase, 175 Minn. 259, 274-75, 220 N.W. 951, 957 (1928).

Following this judicially recognized concept, Regent Sviggum has a fiduciary duty to "defend the autonomy and independence of the University." Board of Regents Policy: *Responsibilities of the Board and Individual Regents*, subd. 2. But his particular high-level Senate employment requires him to place his first loyalty to the legislative branch of government, and to his partisan caucus. Thus, irrespective of the frequency or severity of particular instances of conflict in duties of loyalty, it is the fundamental incompatibility of Regent Sviggum's constitutional role as Regent and his duty of loyalty to the Senate Majority Caucus that cause me to conclude that Regent Sviggum has both an actual conflict of interest, and the appearance of one, under the *Code of Ethics*, Sec. V, subd. 6.

B.

It is true that Regent Sviggum's employment as Executive Assistant to the Majority Caucus is not identical to serving as a State Senator. And it may be argued that for this reason the *Code of Ethics* provision that effectively bars anyone in partisan elective public office from serving as Regent does not apply here. *Id.*, Sec. VII. But while that *Code* section does not directly apply to Regent Sviggum's situation because he is not an elected member of the Majority Caucus, that section's underlying rationale is highly instructive, and buttresses the conclusion that the conflict here is systemic in nature.

The evident purpose of precluding a Regent from running for any partisan office is to preserve the independence of judgment of the Regent, and maintain the public's confidence in the political neutrality and integrity of the Board. The highest guiding principle of the *Code of Ethics*, after all, is that all Regents "put aside parochial interests, keeping the welfare of the entire University, not just a particular constituency, at all times paramount." *Id.*, Sec. I, subd. 2;

see also *id.*, Sec. V, subd. 1; Board of Regents Policy: *Responsibilities of the Board and Individual Regents*, subd. 2(j) (each Regent must “represent all the people of Minnesota and *no particular political interest, community, or constituency.*”) (emphasis added). By flatly barring a Regent from running for partisan office, the *Code* establishes a policy that such activity is categorically inconsistent with Regent service, and that no management plan is feasible or desirable in this context.

In my view, serving as the highest ranking employee of the Senate Majority Caucus is covered by the same principle. After all, that person’s chief responsibility must be to carry out the will of the Majority Leader and his Caucus.³ Indeed, one might reasonably suppose that such an employee likely will be even more partisan and single-minded regarding public policy issues than an elected Senator, whose duty, after all, is to represent all the people of his district, not just those who associate with his party’s caucus. The same cannot be said of the Executive Assistant to the Majority Caucus. For this reason, I conclude that the rationale underlying the *Code*’s categorical bar against a Regent running for any partisan office applies in this case to Regent Sviggum serving as Executive Assistant to the Majority Caucus.

C.

As you and your colleagues consider this issue, I know each of you will be mindful of the duty of each Regent to “enhance the public image of the University and the Board,” and to “speak forthrightly at Board meetings” and “support Board decisions when determined.” Board of Regents Policy: *Responsibilities of the Board and Individual Regents*, subds. 2(k); 2(e).

As always, please do not hesitate to contact me if you wish to discuss any aspect of this matter.

MBR: mwl

cc Eric W. Kaler, President
Brian Steeves, Acting Executive Director and Secretary

³ See Mr. Stout’s opinion discussing Executive Assistant Sviggum’s duties to the Senate Majority Leader and Majority Caucus, at pp. 3-4, including particularly his duties to take direction from the Majority Leader, to act in the best interest of the Caucus, to maintain its confidentiality, and to coordinate its media messages. As Executive Assistant Sviggum stated in a recent radio interview, “I cannot make a decision. I do not make a decision. I am only empowered by the senators themselves.” MPR Interview with Cathy Wurzer, Jan. 18, 2012.